

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BARBARA ANN GROOM, } Case No. EDCV 12-1509 JC
Plaintiff, }
v. }
MICHAEL J. ASTRUE, } MEMORANDUM OPINION AND
Commissioner of Social } ORDER OF REMAND
Security, }
Defendant. }

I. SUMMARY

On September 13, 2012, plaintiff Barbara Ann Groom (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties' cross motions for summary judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion"). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; September 17, 2012 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the
 2 Commissioner is REVERSED AND REMANDED for further proceedings
 3 consistent with this Memorandum Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE
 5 DECISION**

6 On November 8, 2010, plaintiff filed applications for Supplemental Security
 7 Income and Disability Insurance Benefits. (Administrative Record (“AR”) 152,
 8 159). Plaintiff asserted that she became disabled on December 23, 2004, due to
 9 cervical spondylosis with neck pain and myelopathy, migraine headaches, arthritis,
 10 and heart problems. (AR 213, 217). The ALJ examined the medical record and
 11 heard testimony from plaintiff (who was represented by counsel) and a vocational
 12 expert on April 10, 2012. (AR 29-70).

13 On May 25, 2012, the ALJ determined that plaintiff was not disabled
 14 through the date of the decision. (AR 9-23). Specifically, the ALJ found:
 15 (1) plaintiff suffered from the following severe impairments: history of cervical
 16 spondylosis with radiculopathy, status post discectomy and fusion, osteoarthritis
 17 of the hands and joints, right plantar fasciitis, migraines, obesity, depression, and
 18 polysubstance abuse in an unknown state of remission (AR 11); (2) plaintiff’s
 19 impairments, considered singly or in combination, did not meet or medically equal
 20 a listed impairment (AR 12); (3) plaintiff retained the residual functional capacity
 21 to perform light work (20 C.F.R. §§ 404.1567(b), 416.967(b)) with additional
 22 limitations¹ (AR 13-14); (4) plaintiff not could perform her past relevant work

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 24 ¹The ALJ determined that plaintiff (i) could lift and/or carry 20 pounds occasionally and
 25 10 pounds frequently; (ii) could stand and/or walk for six hours out of an eight-hour workday
 26 with regular breaks; (iii) could sit for six hours out of an eight-hour workday with regular breaks;
 27 (iv) needed to be permitted to alternate between sitting and standing at one hour intervals for one
 28 to five minutes at the work station; (v) had no limitations with respect to pushing and/or pulling
 other than those indicated for lifting and/or carrying; (vi) could frequently use her hands for fine
 and gross manipulations; (vii) could frequently rotate her neck from side to side; (viii) could
 occasionally stoop, kneel, crawl, crouch, and climb ramps and stairs; (ix) could occasionally
 (continued...)

1 (AR 21); (5) there are jobs that exist in significant numbers in the national
 2 economy that plaintiff could perform, specifically photocopy machine worker,
 3 lunch room counter attendant, and greeter (AR 22); and (6) plaintiff's allegations
 4 regarding her limitations were not credible to the extent they were inconsistent
 5 with the ALJ's residual functional capacity assessment (AR 16).

6 The Appeals Council denied plaintiff's application for review. (AR 1).

7 **III. APPLICABLE LEGAL STANDARDS**

8 **A. Sequential Evaluation Process**

9 To qualify for disability benefits, a claimant must show that the claimant is
 10 unable "to engage in any substantial gainful activity by reason of any medically
 11 determinable physical or mental impairment which can be expected to result in
 12 death or which has lasted or can be expected to last for a continuous period of not
 13 less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
 14 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The
 15 impairment must render the claimant incapable of performing the work claimant
 16 previously performed and incapable of performing any other substantial gainful
 17 employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094,
 18 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

19 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
 20 sequential evaluation process:

21 (1) Is the claimant presently engaged in substantial gainful activity? If
 22 so, the claimant is not disabled. If not, proceed to step two.

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 25 ¹(...continued)

26 reach overhead bilaterally; (x) could not climb ladders, ropes or scaffolds; (xi) needed to avoid
 27 exposure to unprotected heights; (xii) needed to avoid concentrated exposure to extremely cold
 28 temperatures; (xiii) could sustain concentration and attention, persistence and pace in at least
 two-hour blocks of time; (xiv) could respond appropriately to coworkers, supervisors, and the
 public; and (xv) could "perform simple one-to-two-step job instructions." (AR 13-14).

- (2) Is the claimant's alleged impairment sufficiently severe to limit the claimant's ability to work? If not, the claimant is not disabled. If so, proceed to step three.
- (3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.
- (4) Does the claimant possess the residual functional capacity to perform claimant's past relevant work? If so, the claimant is not disabled. If not, proceed to step five.
- (5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow the claimant to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at 1110 (same).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of proving disability).

B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457

(9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

To determine whether substantial evidence supports a finding, a court must “consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner’s] conclusion.” Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing the ALJ’s conclusion, a court may not substitute its judgment for that of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

IV. DISCUSSION

Plaintiff contends that the ALJ erred at step five in finding that plaintiff could perform the occupations of photocopy machine worker, lunch room counter attendant, and greeter, in part, because the level of complexity required by such jobs is inconsistent with plaintiff’s limitation to “simple one-to-two-step job instructions.” (Plaintiff’s Motion at 11-17) (citing AR 13-14). The Court agrees. As the Court cannot find that the ALJ’s error was harmless, a remand is warranted.

A. Pertinent Law

If, at step four, the claimant meets her burden of establishing an inability to perform past work, the Commissioner must show, at step five, that the claimant can perform some other work that exists in “significant numbers” in the national economy (whether in the region where such individual lives or in several regions of the country), taking into account the claimant’s residual functional capacity, age, education, and work experience. Tackett, 180 F.3d at 1100 (citing 20 C.F.R. § 404.1560(b)(3)); 42 U.S.C. § 423(d)(2)(A). Where, as here, a claimant suffers from both exertional and nonexertional limitations, the Grids do not mandate a

1 finding of disability based solely on the claimant's exertional limitations, and the
 2 claimant's non-exertional limitations are at a sufficient level of severity such that
 3 the Grids are inapplicable to the particular case, the Commissioner must consult a
 4 vocational expert.² Hoopai v. Astrue, 499 F.3d 1071, 1076 (9th Cir. 2007); see
 5 Lounsbury v. Barnhart, 468 F.3d 1111, 1116 (9th Cir.), as amended (2006);
 6 Cooper v. Sullivan, 880 F.2d 1152, 1155 (9th Cir. 1989).

7 The vocational expert's testimony may constitute substantial evidence of a
 8 claimant's ability to perform work which exists in significant numbers in the
 9 national economy when the ALJ poses a hypothetical question that accurately
 10 describes all of the limitations and restrictions of the claimant that are supported
 11 by the record. See Tackett, 180 F.3d at 1101; see also Robbins, 466 F.3d at 886
 12 (finding material error where the ALJ posed an incomplete hypothetical question
 13 to the vocational expert which ignored improperly-disregarded testimony
 14 suggesting greater limitations); Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001)
 15 ("If the record does not support the assumptions in the hypothetical, the vocational
 16 expert's opinion has no evidentiary value.").

17 ALJs routinely rely on the Dictionary of Occupational Titles ("DOT") "in
 18 determining the skill level of a claimant's past work, and in evaluating whether the
 19 claimant is able to perform other work in the national economy." Terry v.
 20 Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990) (citations omitted); see also
 21 20 C.F.R. §§ 404.1566(d)(1); 416.966(d)(1) (DOT is source of reliable job
 22 information). The DOT is the presumptive authority on job classifications.
 23 Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995). An ALJ may not rely on a
 24 vocational expert's testimony regarding the requirements of a particular job
 25 without first inquiring whether the testimony conflicts with the DOT, and if so, the

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 27 ²The severity of limitations at step five that would require use of a vocational expert must
 28 be greater than the severity of impairments determined at step two. Hoopai v. Astrue, 499 F.3d
 1071, 1076 (9th Cir. 2007).

1 reasons therefor. Massachi v. Astrue, 486 F.3d 1149, 1152-53 (9th Cir. 2007)
 2 (citing Social Security Ruling 00-4p).³ In order for an ALJ to accept vocational
 3 expert testimony that contradicts the DOT, the record must contain “persuasive
 4 evidence to support the deviation.” Pinto v. Massanari, 249 F.3d 840, 846 (9th
 5 Cir. 2001) (quoting Johnson, 60 F.3d at 1435). Evidence sufficient to permit such
 6 a deviation may be either specific findings of fact regarding the claimant’s residual
 7 functionality, or inferences drawn from the context of the expert’s testimony.
 8 Light v. Social Security Administration, 119 F.3d 789, 793 (9th Cir.), as amended
 9 (1997) (citations omitted).

10 **B. Analysis**

11 A job’s level of simplicity is addressed by its General Educational
 12 Development (“GED”) reasoning rating. Carney v. Astrue, 2010 WL 5060488, at
 13 *4 (C.D. Cal. Dec. 6, 2010) (citing Meissl v. Barnhart, 403 F. Supp. 2d 981, 983
 14 (C.D. Cal. 2005)). DOT job descriptions include a GED definition component
 15 “which embraces those aspects of education (formal and informal) which are
 16 required of the worker for satisfactory job performance.” Grigsby v. Astrue, 2010
 17 WL 309013, *2 (C.D. Cal. Jan. 22, 2010) (internal quotation marks omitted). The
 18 GED component is comprised of discrete scales, including a scale for “Reasoning
 19 Development.” Id. The GED reasoning development scale ranges from Level 1
 20 (low) to Level 6 (high). Id. Levels 1 and 2 are defined as follows:

21 Level 1 Apply commonsense understanding to carry out simple one-or
 22 two-step instructions. Deal with standardized situations with
 23 occasional or no variables in or from these situations
 24 encountered on the job.

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 26 ³Social Security rulings are binding on the Administration. See Terry, 903 F.2d at 1275.
 27 Such rulings reflect the official interpretation of the Social Security Administration and are
 28 entitled to some deference as long as they are consistent with the Social Security Act and
 regulations. Massachi, 486 F.3d at 1152 n.6.

1 Level 2 Apply commonsense understanding to carry out detailed but
 2 uninvolved written or oral instructions. Deal with problems
 3 involving a few concrete variables in or from standardized
 4 situations.

5 Id. (citing DOT, Appendix C).

6 Here, the ALJ erred at step five because she found plaintiff not disabled
 7 based on testimony from the vocational expert which, without explanation,
 8 deviated from the DOT.

9 First, the vocational expert's testimony was inconsistent the DOT. In her
 10 hypothetical question to the vocational expert, the ALJ included a limitation to
 11 occupations involving only "simple one-to-two-step job instructions." (AR 57, 61,
 12 66-67). The vocational expert testified that, in spite of such limitations, plaintiff
 13 (or a hypothetical person with plaintiff's characteristics) could perform the
 14 occupations of photocopy machine worker, lunch room counter attendant, and
 15 greeter – each of which, according to the DOT, require a reasoning development
 16 level of 2. (AR 57, 61, 66-67); DOT §§ 207.685-014 ("Photocopying-Machine
 17 Operator"), 311.477-014 ("Counter Attendant, Lunchroom or Coffee Shop"),
 18 222.687-010 ("Checker I" a/k/a "greeter"). An individual who is limited to "one-
 19 to-two-step job instructions," however, would be precluded from such jobs. Level
 20 2 reasoning jobs involve "detailed but uninvolved written or oral instructions,"
 21 which by definition is more complex than Level 1 reasoning jobs which are
 22 limited to "simple one-or two-step instructions." Grigsby, 2010 WL 309013 at *2
 23 ("The restriction to jobs involving no more than two-step instructions is what
 24 distinguishes Level 1 reasoning from Level 2 reasoning.").

25 Second, since the vocational expert essentially denied that there was any
 26 conflict between the DOT and his testimony regarding the requirements of any of
 27 the three representative jobs (AR 66-69), neither the vocational expert nor the ALJ
 28 provided any persuasive explanation for the deviation. For example, when the

1 ALJ asked whether the job of photocopy machine worker “would [] fall within the
 2 range of the one-to-two-step instructions” the vocational expert responded simply
 3 “[a]s per the DOT.” (AR 67). Similarly, when plaintiff’s attorney asked “you’re
 4 saying the lunchroom counter attendant never has any tasks exceeding one to two
 5 steps[],” the vocational expert responded “[a]ccording to the DOT, SVP: 2,
 6 unskilled.”⁴ (AR 67). Even when the attorney pressed further, the vocational
 7 expert declined to change his opinion.⁵ With respect to the representative job of
 8 “greeter,” plaintiff’s attorney likewise asked whether the requirements of that
 9 position would “[ever] exceed[] one to two step tasks,” and the vocational expert
 10 responded “[n]ot as per the DOT.” (AR 69). When asked whether, based on his
 11 experience, the vocational expert would “differ from the DOT [or] agree with it”
 12 regarding such requirement, the vocational expert responded only “[i]t’s a
 13 relatively simple position.” (AR 69). Accordingly, the vocational expert’s
 14 testimony, which the ALJ adopted, could not serve as substantial evidence
 15 supporting the ALJ’s determination at step five that plaintiff could perform the
 16 occupations of photocopy machine worker, lunch room counter attendant, and
 17 greeter. Pinto, 249 F.3d at 846.

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20 ⁴To the extent the vocational expert suggested that the position of lunch room counter
 21 attendant was consistent with plaintiff’s limitation to one-to-two-step instructions because the
 22 position had a specific vocational preparation (“SVP”) level of two (AR 67), the vocational
 23 expert did not provide a persuasive explanation for his deviation from the DOT. As noted above,
 24 a job’s level of simplicity is more properly addressed by its GED reasoning development rating,
 not, as the vocational expert suggests, by its SVP level. See Meissl, 403 F. Supp. 2d at 983
 (“SVP ratings speak to the issue of the level of vocational preparation necessary to perform the
 job, not directly to the issue of a job’s simplicity. . . .”) (citation and quotation marks omitted).

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29 ⁵Specifically, plaintiff’s attorney asked “[b]ased on your experience, if there’s a problem
 with the food or with something that’s being done, I mean what would that person do? Wouldn’t
 that exceed one-to-two-step tasks if they [sic] have to solve a problem or return an order or do
 something like that?” (AR 67-68). The vocational expert responded “[w]ell, a counter attendant
 is not a restaurant owner or an assistant manager. You know, basically just serving the food.”
 (AR 68).

1 Finally, the Court cannot find such error harmless as defendant points to no
2 other persuasive evidence in the record which could support the ALJ's
3 determination at step five that plaintiff was not disabled. See, e.g., id. at 846-47
4 (remand warranted where ALJ found claimant not disabled at step four based
5 "largely" on vocational expert's testimony that conflicted with DOT, neither ALJ
6 nor vocational expert addressed the deviation, and ALJ otherwise "made very few
7 findings"); cf. Tommasetti v. Astrue, 533 F.3d 1035, 1042 (9th Cir. 2008) (ALJ
8 erred in finding that claimant could return to past relevant work based on
9 vocational expert's testimony that deviated from DOT because ALJ "did not
10 identify what aspect of the [vocational expert's] experience warranted deviation
11 from the DOT, and did not point to any evidence in the record other than the
12 [vocational expert's] sparse testimony" to support the deviation, but error was
13 harmless in light of ALJ's alternative finding at step five, which was supported by
14 substantial evidence, that claimant could still perform other work in the national
15 and local economies that existed in significant numbers).

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1 **V. CONCLUSION⁶**

2 For the foregoing reasons, the decision of the Commissioner of Social
3 Security is reversed in part, and this matter is remanded for further administrative
4 action consistent with this Opinion.⁷

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: January 25, 2013

7 /s/

8 Honorable Jacqueline Chooljian
9 UNITED STATES MAGISTRATE JUDGE

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21 ⁶The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's
22 decision, except insofar as to determine that a reversal and remand for immediate payment of
23 benefits would not be appropriate. On remand, however, the ALJ may wish to consider any
24 evidence plaintiff may submit regarding the availability in the national and regional economy of
any representative jobs identified by the ALJ at step five, and may wish to determine whether the
ALJ properly evaluated the subjective symptom testimony plaintiff gave during the
administrative hearing.

25 ⁷When a court reverses an administrative determination, "the proper course, except in rare
26 circumstances, is to remand to the agency for additional investigation or explanation."
27 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and
28 quotations omitted). Remand is proper where, as here, additional administrative proceedings
could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
1989).